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June 4, 1999

Guy M. Hicks  
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OFFICE OF THE  
EXECUTIVE SECRETARY

VIA HAND DELIVERY

David Waddell, Executive Secretary  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, TN 37238

Re: *Proceeding for the Purpose of Addressing Competitive Effects of Contract Service Arrangements Filed by BellSouth Telecommunications, Inc. in Tennessee*  
Docket No. 98-00559

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth Telecommunications, Inc.'s Response to the Third Report and Recommendation of the Pre-Hearing Officer. Copies of the enclosed are being provided to counsel of record for all parties.

Very truly yours,



Guy M. Hicks

GMH:ch  
Enclosure

**BEFORE THE TENNESSEE REGULATORY AUTHORITY**  
**Nashville, Tennessee**

*In re:           Proceeding for the Purpose of Addressing Competitive Effects of  
Contract   Service   Arrangements   Filed   by   BellSouth  
Telecommunications, Inc. in Tennessee*

**Docket No. 98-00559**

**BELLSOUTH TELECOMMUNICATIONS, INC.'S**  
**RESPONSE TO THIRD REPORT AND RECOMMENDATION**  
**OF PRE-HEARING OFFICER**

**I. INTRODUCTION**

BellSouth Telecommunications, Inc. ("BellSouth") respectfully responds to the Third Report and Recommendation of the Pre-Hearing Officer entered on June 1, 1999. BellSouth concurs with the Pre-Hearing Officer's resolution of the motions to compel discovery and agrees that, once discovery has been completed in this docket, the Authority should conduct a rulemaking to address the offering of special contracts on an industry-wide basis.

However, BellSouth disagrees with the Pre-Hearing Officer's suggestion that: (1) issues in this case should be resolved through a contested case proceeding; and (2) any individual CSA for which the Authority decides to convene a contested case should be consolidated with this docket. BellSouth believes that such a procedure would be administratively unworkable, would unreasonably delay BellSouth's customers from enjoying the benefits of lower prices, and would only encourage regulatory gamesmanship by BellSouth's competitors. Accordingly, the Authority should reject this aspect of the Pre-Hearing Officer's Third Report and Recommendation.

## **II. DISCUSSION**

### **A. The Issues In This Docket Should Be Resolved Through A Rulemaking, Rather Than A Contested Case.**

BellSouth has steadfastly maintained that any issues surrounding BellSouth's CSAs should be addressed through a rulemaking proceeding that examines special contracts on an industry-wide basis. The Pre-Hearing Officer appears to agree. *See* Third Report and Recommendation at 5 (recommending "the opening of another docket, as soon as practicable, for the purpose of promulgating rules that will address industry-wide practices of offering Contract Service Arrangements").

However, while proposing a rulemaking proceeding, the Pre-Hearing Officer also recommends "that this proceeding move to hearing on the list of issues previously approved ...."

*Id.* Yet, the Pre-Hearing Officer does not explain what a contested case proceeding is intended to achieve that a rulemaking would not. Presumably, any rulemaking would address the very issues that have been raised in this docket, and no point would be served in having the Authority expend the time and effort in conducting two proceedings to address the same issues.<sup>1</sup>

Furthermore, there are critical threshold questions that must be resolved before a contested case proceeding can be held. For example, who has the burden of proof on the issues that have been identified? What is the relief to be awarded? Will the relief only be prospective? Or, does the Authority envision granting relief that would affect existing CSAs that the Authority

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<sup>1</sup> The Pre-Hearing Officer noted that some parties proposed "that the issue of discrimination as it relates to the offering of contract service arrangements, by either BellSouth or by CLECs, should be examined in the context of a rulemaking proceeding." Third Report and Recommendation at 3. However, the Pre-Hearing Officer did not indicate whether he agreed with this proposal, nor did he identify the specific issues that purportedly fall into this category. BellSouth believes that issues surrounding alleged "anticompetitive or discriminatory effects" of BellSouth's CSAs are integrally related and cannot be readily segregated.

has already approved, in which case every existing CSA customer would have the right to intervene since that customer's interests could be affected by the outcome? These procedural questions are matters of some complexity, particularly given that the Authority initiated this proceeding. These questions have not been addressed, let alone resolved, which only underscores the undesirability of proceeding with a contested case hearing at this juncture.

It is important to note that BellSouth has not waited for this docket to be concluded in order to address the Authority's concerns about CSAs. For example, in March Director Greer expressed a concern that "CSAs for more than two or three years were too long." March 16, 1999 Directors' Conference, Tr. at 47-48. BellSouth has since addressed this concern. It has amended CSAs to shorten the term to three years and has not submitted for approval any CSA for a term longer than three years. See, *e.g.*, Amendment to CSA TN97-7370-04 submitted by BellSouth to the Authority on May 25, 1999.

Director Greer also expressed a concern about the number of CSAs entered into by BellSouth, observing that CSAs should be "for exceptions and not the normal course of business." March 16, 1999 Directors' Conference, Tr. at 51. BellSouth has adhered strictly to this observation. According to the Authority's report to the Tennessee General Assembly, BellSouth had 204,115 business customers in Tennessee in 1998. See "The Status of Local Telecommunications Competition in Tennessee, 1997-1998, Appendix C. Through the end of 1998, the Authority had approved 171 CSAs, which, assuming a different business customer for each CSA, means that only 0.084% of BellSouth's total business base according to the Authority's figures is subject to a CSA. Even allowing for the additional 23 CSAs approved by the Authority to date in 1999, the percentage of business customers covered by a CSA is less than one percent. Furthermore, the number of CSAs entered into by BellSouth has been steadily

diminishing. In 1997, BellSouth submitted 116 CSAs to the Authority for approval. By contrast, in 1999, BellSouth has submitted 29 CSAs as of today. Thus, CSAs are truly the exception, not the rule.

BellSouth also has modified its termination provisions in response to the Authority's concerns, streamlining the method by which termination liability is calculated and ensuring consistency with the termination liability provisions of its tariffs (where applicable). See BellSouth's letter of December 7, 1998 to the Authority setting forth new early termination liability provisions to be offered to Volume and Term CSA customers. BellSouth also recently expanded access to its CSAs in response to concerns from the Staff so that now the terms and conditions of BellSouth's CSAs are available for public inspection (with only the customer's name and address redacted). See BellSouth's letter of May 26, 1999 to the Authority confirming the agreement to make CSA terms and conditions available for public inspection.

In short, this docket has served its purpose. It has afforded the Authority the opportunity to raise concerns about BellSouth's CSAs, and given BellSouth the chance to address those concerns. It also has allowed the Authority and the parties to discover facts about the use of special contracts in the telecommunications market in Tennessee and to pierce the rhetoric about the competitive effect of BellSouth's CSAs in the marketplace. Once outstanding discovery has been completed, the Authority can utilize this information in a rulemaking proceeding. Accordingly, no purpose is served in continuing with a contested case hearing.

**B. Cases Involving Individual CSAs Should Not Be Consolidated With This Docket.**

In the event the Authority convenes a contested case in the pending dockets in which individual CSAs have been submitted for approval, the Pre-Hearing Officer recommends "that

the individual dockets be consolidated with this proceeding and that the proceeding be conducted as one contested case proceeding.” Third Report and Recommendation at 4. This recommendation is flawed.

First, the Authority should not convene a contested case in any of the pending dockets in which individual CSAs have been submitted for approval. As outlined more fully in BellSouth’s opposition to the petitions for intervention filed by SECCA, NEXTLINK, and Time Warner, none of these parties has alleged any relevant facts in support of their claims, as is required by the Authority’s rules. These parties have utterly failed to identify any factual basis for the Authority’s disapproving the particular CSA at issue, but have simply rehashed the same general allegations that have been raised in this docket. The CSAs presently pending before the Authority are indistinguishable from CSAs previously approved by the Authority without a contested case hearing.

Second, the Pre-Hearing Officer expressed “the opinion that the ultimate issues in this proceeding will be similar, if not identical, to the issues raised in these individual CSA dockets,” which is simply not the case. As Director Greer has correctly observed, any individual CSA should be approved unless there is a “compelling reason” to deny that CSA “based upon our rules.” March 16, 1999 Directors’ Conference, Tr. at 50-51. Thus, the issue before the Authority in considering the individual CSAs is whether that CSA complies with the Authority’s existing rules; the issues in this docket ultimately involve whether those existing rules should be changed. These are completely different inquiries.

Third, accepting the Pre-Hearing Officer’s recommendation would prejudice those CSA customers who are awaiting the Authority’s approval before they can enjoy the benefit of lower prices. Even if the Authority were to convene a contested case to consider these pending CSAs

(which the Authority should not do), it should do so promptly to determine whether that particular CSA violates the Authority's existing rules, giving each individual CSA customer the opportunity to be heard. There is simply no reason to throw individual CSA customers into this generic docket, which, as previously mentioned, involves complex issues of administrative law that could take considerable time to sort out. Although the Pre-Hearing Officer has recommended an expedited schedule for the completion of discovery and the filing of testimony, no hearing date has been set, and there is no indication when the Authority is to render a decision, particularly when the basic question concerning the form of relief to be granted remains unanswered. The ability of BellSouth's CSAs customers to enjoy the benefit of lower prices should not be delayed while the Authority decides how to resolve the broader issues raised in this docket.

Fourth, following the Pre-Hearing Officer's recommendation will only encourage regulatory gamesmanship by BellSouth's competitors. Previously, these competitors have not opposed the Authority's approval of BellSouth's CSAs, apparently content to have their concerns about CSAs addressed in this docket. Over the past three years, the Authority has approved 194 CSAs without any objection from BellSouth's competitors. Now, apparently dissatisfied with the progress in this docket, certain of BellSouth's competitors have altered their strategy, seeking to intervene in individual CSA cases. If the Authority starts down the course of folding each individual CSA into this generic docket upon the filing of a petition to intervene, BellSouth's competitors could effectively delay approval of any CSA simply by cranking up the word processor and seeking intervention in every CSA filed by BellSouth. BellSouth's competitors

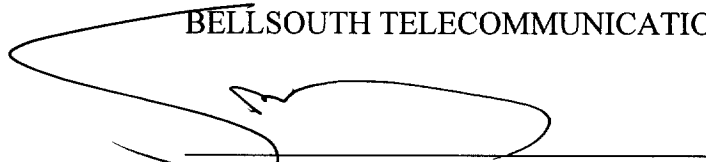
should not be given the power to control BellSouth's use of CSAs, which is precisely what will happen if the Authority were to accept the Pre-Hearing Officer's recommendation.<sup>2</sup>

### III. CONCLUSION

For the foregoing reasons, the Authority should adopt the Pre-Hearing Officer's order resolving the outstanding discovery disputes and his recommendation that the Authority convene a rulemaking proceeding. However, the other procedural aspects of the Pre-Hearing Officer's Third Report and Recommendation should be rejected.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

A large, stylized handwritten signature in black ink, appearing to read 'Guy M. Hicks', is written over a horizontal line.

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<sup>2</sup> The Authority should be particularly reluctant to reward competitors such as NEXTLINK and Time Warner who seek to intervene in BellSouth's CSA cases while at the same time refusing to comply with the Authority's rules applicable to their special contracts. Even though the Authority's rules require that CLECs file summaries of their special contracts and even though the Authority wrote CLECs directing compliance with this rule, NEXTLINK and Time Warner have yet to comply.



CERTIFICATE OF SERVICE

I hereby certify that on June 4, 1999, a copy of the foregoing document was served on the parties of record, via the method indicated:

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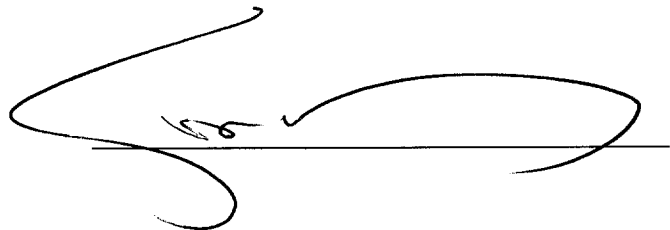
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